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WU SOR HWA & ORS v. DATO' SRI DR ABDULLAH FADZIL CHE WAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ADLIN ABDUL MAJID J
[SUIT NO: WA-22NCC-352-10-2016]
B 21 FEBRUARY 2025

Abstract – *The principle in awarding damages due to a breach of contract is that the damages awarded must place the plaintiff in a position as close as possible to that as if the contract for which the damages are sought had not been breached and had been performed.*

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CONTRACT: *Breach – Action for damages – Plaintiffs sought general damages due to breach of shareholders' agreement ('agreement') – Defendants acted contrary to clauses of agreement, by transferring its shares in company to third party, without written consent of plaintiffs and affording same right of first refusal – Whether plaintiffs ought to be awarded general damages – Assessment of damages – Whether nominal damages should be granted – Whether damages sought satisfied remoteness test*

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E The first and third plaintiffs ('plaintiffs'), together with the first to fourth defendants, had executed a shareholders' agreement ('agreement'). The agreement governed the said parties' relationship as shareholders of the fifth defendant. The plaintiffs claimed that the first to fourth defendants had breached cls. 6.1, 6.2, 6.4 and 6.5 of the agreement, *inter alia*, by transferring its shares in the fifth defendant ('impugned shares') to a third party, the sixth defendant, on 18 May 2016, without the plaintiffs' written consent and without affording the same the right of first refusal to purchase the impugned shares as provided under the agreement. Subsequently, on 31 October 2018, the plaintiffs obtained a judgment against the first to fourth defendants, for the breach of the agreement ('judgment'). Pursuant to the judgment, the court ordered the impugned shares to be transferred by the first to fourth defendants to the plaintiffs on 28 February 2019. The present application filed by the plaintiffs was for assessing the damages as a result of the breach of the agreement committed by the first to fourth defendants. The following issues also arose: (i) whether nominal damages ought to be awarded; and (ii) whether the damages sought did not satisfy the remoteness test.

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Held (allowing application; awarding general damages of RM144,322,499 to the plaintiffs):

(1) If the agreement was not breached, the plaintiffs would have been given the first right of refusal and would have been able to purchase the impugned shares on or around 18 May 2016. As such, to put the plaintiffs in a position as close as possible as if the agreement was not breached, the plaintiffs should be entitled to damages calculated in the

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following manner: (i) the value of the impugned shares on 18 May 2016, the date when the shares were transferred to the sixth defendant; LESS; (ii) the price paid by the sixth defendant for the transfer on 18 May 2016, which would have been the consideration paid by the plaintiffs for the impugned shares had the shares been transferred to the plaintiffs; LESS; and (iii) the value of the impugned shares on 28 February 2019, being the date the impugned shares were transferred to the plaintiffs pursuant to the judgment. (paras 12 & 13)

(2) In assessing the value of the impugned shares on 18 May 2016, the following evidence had been relied upon: (i) two valuation reports of HVS Advisory Sdn Bhd ('HVS') which valued the fifth defendant at RM201,058,771 and RM423,680,281; (ii) the testimony of the second defendant which agreed that the valuation of the fifth defendant was RM200,000,000; and (iii) an article in the Star newspaper which quoted the chief group executive director and the chief executive officer of the fifth defendant who stated that the fifth defendant was valued at RM200,000,000. From these evidences, the valuation of the fifth defendant at RM200,000,000 as of 18 May 2016 was fair and reasonable. The value of the impugned shares, which was 75% of the share of the fifth defendant, was therefore RM150,000,000. Other than that, regarding the price of the impugned shares transferred to the sixth defendant on 18 May 2016, the amount as derived from the share transfer forms was RM5,677,500. This would be the consideration paid by the plaintiffs for the impugned shares had the shares been transferred to them. (paras 14-16)

(3) Pursuant to para. (4) of the judgment, an independent receiver and manager over the entire undertakings and assets of the fifth defendant, pending the purchase and transfer of the impugned shares to the plaintiffs, from PKF Covenant Sdn Bhd ('PKF'), was appointed. According to PKF's report on the administration of the fifth defendant for the period between 26 December 2018 to 28 February 2019, the fifth defendant had insufficient cash to meet its expenses. Additionally, the plaintiffs also produced a special audit report and a valuation report by Vearsa Advisory Sdn Bhd, together with the fifth defendant's audited financial statements for the years ended 2018 and 2019. These documents, read together with the PKF's report, valued the fifth defendant at a nominal value of RM1, with the future acquirer having to bear the net liabilities of the fifth defendant. The reports also showed that between the date of the judgment and the date the impugned shares were transferred to the sixth defendant, the ecosystem of the fifth defendant and its subsidiaries had been destroyed, with these companies not having any employees, management, office premises or audit

records. The first to fourth defendants tried to counter the reports produced by the plaintiffs, but their report did not contain a valuation of the fifth defendant. The said report also failed to rebut the plaintiffs' claim that the fifth defendant had a nominal value at the time the impugned shares were transferred to the plaintiffs. The PKF's report therefore could not be challenged by the first to fourth defendants. Based on these considerations and that: (i) the value of the fifth defendants as at 18 May 2016 was RM150,000,000; (ii) the consideration that would have been paid by the plaintiffs for the impugned shares had the shares been transferred to them was RM5,677,500; and (iii) less the value of the impugned shares as at 28 February 2019, the nominal value of the fifth defendant was RM1, the amount of general damages to be awarded to the plaintiffs was RM144,322,499. (paras 17-26)

(4) The first to fourth defendants' argument that nominal damages ought to be awarded was not agreed. The said argument was irrelevant to the issue of the calculation of general damages, and it ignored the implication of the breach, which was that the impugned shares were not first offered to the plaintiffs. Whether the transfer was *via* a share swap or otherwise, under the agreement, the first to fourth defendants were obligated to offer shares to the plaintiffs before the shares could be transferred to a third party. Had the impugned shares been offered to the plaintiffs, the plaintiffs would have been able to purchase the shares. Therefore, the damages to be awarded must reflect a scenario in which the impugned shares had been purchased by the plaintiffs on or around 18 May 2016. (paras 27 & 28)

(5) The measure of damages that would arise directly from the breach would be the value of the impugned shares that the plaintiffs would have been able to purchase on 18 May 2016. These damages arose directly as a consequence of the first to fourth defendants' breach of the agreement. There was a direct causal connection between the breach committed and the damages suffered by the plaintiffs. Further, the damages would have been within the reasonable contemplation of the parties when they entered into the agreement. (para 32)

Case(s) referred to:
Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd [2023] 3 CLJ 175 CA ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74

For the plaintiffs - Steven How, Daryl Chang & S Shahman; M/s Kumar Jaspal Quah & Aishah
For the 1st-4th defendants - George Miranda & Sam Jia Qian; M/s Miranda & Samuel

Reported by Syamim Ariffin

JUDGMENT

Adlin Abdul Majid J:

Introduction

[1] Following a judgment dated 31 October 2018 obtained by the plaintiffs against the defendants ('judgment'), the plaintiffs applied to this court for damages to be assessed.

[2] For the reasons elaborated below, the court awarded general damages of RM144,322,499 to the plaintiffs.

Background Facts

[3] The plaintiffs claimed that the defendants had breached a shareholders' agreement dated 19 November 2010 ('shareholders' agreement'), which was executed between the first plaintiff, the third plaintiff and the first to fourth defendants. The shareholders' agreement governed their relationship as shareholders of the fifth defendant.

[4] The plaintiffs claimed the first to fourth defendants had breached the shareholders' agreement by, amongst others, transferring the first to fourth defendants' shares in the fifth defendant ('impugned shares') to the sixth defendant without the plaintiffs' consent and in breach of the right of first refusal provided for under the shareholders' agreement.

[5] The court found that there had been a breach of the shareholders' agreement, and the judgment was awarded in favour of the plaintiffs, with damages to be assessed.

Terms Of The Judgment

[6] In assessing damages, I considered the terms of the judgment which contained amongst others, the following declarations:

(i) that the shareholders' agreement is terminated (para. (1));

(ii) that the first to fourth defendants and the sixth defendant have breached cls. 6.1, 6.2. 6.4 and 6.5 of the shareholders' agreement, for, *inter alia*, transferring the impugned shares without the prior written consent of the plaintiffs (para. (2)); and

(iii) that an offer is deemed made by the first to fourth defendants and the sixth defendant to the plaintiffs pursuant to cl. 12.2 of the shareholders' agreement to purchase the impugned shares valued at net tangible assets divided by the total number of ordinary shares issued amounting to a total of RM1 (para. (3)). As a consequence of this declaration, the court ordered the impugned shares to be transferred to the plaintiffs (para. (4)).

[7] Further, in para. (6) of the judgment, the court awarded general damages for breach of the shareholders' agreement to be paid by the first to fourth defendants to the plaintiffs, whereby such damages are to be assessed by the court. The plaintiff's application for damages to be assessed relates to this paragraph.

Assessment And Findings

[8] As a matter of principle, an award of damages should place a plaintiff in a position as close as possible to that as if the contract for which the damages are sought had not been breached and had been performed (see the judgment of the Federal Court in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777, at p. 787H).

[9] To put this principle into effect, I first considered the provisions of the shareholders' agreement which the court declared the first to fourth defendants and the sixth defendant had breached. These clauses are reproduced below:

a. Clause 6.1: "For so long as PC [3rd defendant] and PM [Pesona Metro Sdn Bhd] shall hold any share in the Company [5th defendant] (including without limitation any Ordinary Shares, Preference Shares or Conversion Shares), *the other Shareholders (including VS [1st and 2nd defendants]) shall not sell, transfer or otherwise dispose of any shares in the Company held by them without the prior written consent of PC and PM.* The other Shareholders (including VS) shall not mortgage, charge, or otherwise encumber all or any part of their interest in their shares in the Company except with the prior written consent of PC and PM."

b. Clause 6.2: "Subject to Clause 6,1, *if any other Shareholders of the Company (including VS) wishes to sell and/or transfer its Shares to a third party, VS shall ensure that PC and PM be given the first right of refusal to purchase these shares* or be entitled (but not obliged) to sell and/or transfer up to a proportionate number (as it bears to the entire issued share capital of the Company) of its holding of Ordinary Shares (include Preference Shares and Conversion Shares, if any) to the third party *on no less favourable terms and conditions as are applicable to such other Shareholder(s).* Upon any exercise by PC and PM of either of the foregoing entitlement, the other Shareholders shall not transfer or sell any of its shares to the third party unless the relevant shares of PC and PM are so purchased by the third party."

c. Clause 6.4: "All third parties which acquire shares in the Company shall (unless PC and/or PM directs otherwise) enter into a deed of adherence and accession under which the third party shall agree to be bound by the obligations, and shall be entitled to the benefit, of this Agreement (in place of the transferor of those Shares, where applicable)."

d. Clause 6.5: "The Company and VS shall ensure that the restrictions on sales, transfers and disposal of the Shares in the Company, as elaborated in this Clause 6, shall be expressly endorsed on each share certificate issued by the Company at the point of issue of that share certificate and documentary evidence of such compliance shall be forwarded to PC and/or PM within 14 days after the date of this Agreement or the issue of each share certificate (whichever is later)." (emphasis added)

[10] Essentially, these clauses require the first to fourth defendants to seek the consent of the plaintiffs and to give the plaintiffs the first right of refusal to purchase the first to fourth defendants' shares in the fifth defendant, before the shares can be transferred to a third party (in this case, to the sixth defendant).

[11] By the judgment, the court found that the first to fourth defendants had breached the shareholders' agreement as they had transferred the impugned shares on 18 May 2016 without the consent of the plaintiffs and without giving the plaintiffs the first right of refusal to purchase the shares. The court ordered these shares to be transferred to the plaintiffs. The impugned shares were transferred to the plaintiffs pursuant to the judgment, on 28 February 2019.

[12] If the shareholders' agreement had not been breached, the plaintiffs would have been given the first right of refusal and been able to purchase the impugned shares on or around 18 May 2016, which is the date the shares were transferred to the sixth defendant. However, the impugned shares were only transferred to the plaintiffs pursuant to the judgment on 28 February 2019.

[13] As such, the court finds that to put the plaintiffs in a position as close as possible to that as if the shareholders' agreement had not been breached, the plaintiffs should be entitled to damages calculated in the following manner:

(i) the value of the impugned shares on 18 May 2016, the date the shares were transferred to the sixth defendant; LESS

(ii) the price paid by the sixth defendant for the transfer on 18 May 2016, which would have been the consideration paid by the plaintiffs for the impugned shares had the shares been transferred to the plaintiffs; LESS

(iii) the value of the impugned shares on 28 February 2019, being the date these shares were transferred to the plaintiffs pursuant to the judgment.

[14] In assessing the value of the impugned shares on 18 May 2016, I relied on the following:

(i) two valuation reports of HVS Advisory Sdn Bhd ('HVS'). One dated 20 November 2014 which valued the fifth defendant at RM201,058,771, and the other dated 20 August 2018 which valued the fifth defendant a RM423,680,281. These reports were relied on by the defendants during the trial of this matter;

(ii) the testimony of the second defendant during the trial, supporting the HVS valuation report dated 20 November 2014, and agreeing that the valuation of the fifth defendant is RM200,000,000, based on the advice of consultants; and

(iii) an article dated 5 September 2016 in the Star newspaper, which quoted the chief group executive director and chief executive officer of the fifth defendant valuing the fifth defendant at RM200,000,000, based on historical data, sales, turnover and profit.

[15] From the above evidence, I find the valuation of the fifth defendant at RM200,000,000 as at 18 May 2016, to be fair and reasonable. The value of the impugned shares, which is 75% of the share of the fifth defendant is therefore RM150,000,000.

[16] I then took into account the price the impugned shares were transferred to the sixth defendant on 18 May 2016. This amount, derived from share transfer forms is RM5,677,500. This is the consideration that would have been paid by the plaintiffs for the impugned shares had the shares been transferred to them.

[17] Finally, I considered the value of the impugned shares on 28 February 2019, the date the shares were transferred to the plaintiffs pursuant to the judgment. To determine the value of these shares, there is a need to determine the value of the fifth defendant.

[18] Under para. (4) of the judgment, the court ordered that:

(i) an independent receiver and manager and manager shall be appointed over the undertakings and assets of the fifth defendant, and to manage the fifth defendant (para. (4)(a)); and

(ii) an independent auditor nominated by the plaintiffs shall be appointed to determine the price per share of the ordinary shares of the fifth defendant at net tangible assets/total number of ordinary shares issued (para. (4)(b)).

[19] Pursuant to para. (4) of the judgment, Anthony Joseph Skelchy of PKF Covenant Sdn Bhd ('PKF') was appointed as an independent receiver and manager over the entire undertakings and assets of the fifth defendant, pending the purchase and transfer of the impugned shares to the plaintiffs.

[20] According to PKF's report dated 15 April 2019 on the administration of the fifth defendant for the period between 26 December 2018 to 28 February 2019, the fifth defendant had insufficient cash to meet its expenses.

[21] In addition to PKF's report, the plaintiffs also produced a special audit report dated 21 July 2020 and a valuation report dated 11 November 2021 by Vearsa Advisory Sdn Bhd, together with the fifth defendant's audited financial statements for the years ended 2018 and 2019. These reports and financial statements, read together with the PKF report, valued the fifth defendant at a nominal value of RM1, with the future acquirer having to bear the net liabilities of the fifth defendant.

[22] The reports also show that between the date of the judgment until the impugned shares were transferred to the plaintiffs on 28 February 2019, the ecosystem of the fifth defendant and its subsidiaries had been destroyed, with these companies not having any employees, management, office premises or audit records.

[23] The first to fourth defendants countered the reports produced by the plaintiffs with a report dated 30 December 2021 from Moore. However, this report does not contain a valuation of the fifth defendant. Instead, it merely provides a commentary from an accounting perspective as to whether the financial statements of the fifth defendant can be relied upon by valuers as a basis of valuation. I find the report fails to rebut the plaintiffs' claim that the fifth defendant had a nominal value at the time the impugned shares were transferred to the plaintiffs.

[24] Further and in any event, as PKF is an independent receiver and manager appointed pursuant to the judgment, I am of the view that PKF's findings on the financial status of the fifth defendant cannot be challenged by the first to fourth defendants.

[25] With the above considerations, I find that general damages awarded to the plaintiffs can be fairly calculated in the following manner:

(i) the value of the fifth defendant as at 18 May 2016 (RM200,000,000) x 75% (the percentage of the impugned shares in the fifth defendant) = RM150,000,000;

(ii) less the price the impugned shares were transferred to the sixth defendant on 18 May 2016, which is the consideration that would have been paid by the plaintiffs for the impugned shares had the shares been transferred to them (RM5,677,500); and

(iii) less the value of the impugned shares as at 28 February 2019 (the nominal value of RM1, based on the finding that the fifth defendant is valued nominally at RM1).

[26] The above calculation results in an amount of damages of RM144,322,499.

[27] I am unable to agree with the first to fourth defendants' arguments that nominal damages should be awarded. The first argument raised by the first to fourth defendants is that the sale of the impugned shares to the sixth defendant was merely a share swap exercise. It was contended that after the share swap, the first to fourth defendants owned the shares in the fifth defendant through their ownership of the sixth defendant. As such, the transfer of the impugned shares did not have any material effect on the ownership of the fifth defendant.

[28] I find this argument to be irrelevant to the issue of the calculation of general damages due to the plaintiffs. This argument ignores the implication of the breach, which is that the impugned shares were not first offered to the plaintiffs. Whether the transfer was *via* a share swap or otherwise, under the shareholders' agreement, the first to fourth defendants are obligated to offer shares to the plaintiffs before the shares could be transferred to a third party. Had the shares been offered to the plaintiffs, the plaintiffs would have been able to purchase the shares. Hence, damages to be awarded must reflect a scenario in which the impugned shares had been purchased by the plaintiffs on or around 18 May 2016.

[29] The second argument raised is that the damages sought do not satisfy the remoteness test. The first to fourth defendants referred to s. 74 of the Contracts Act 1950, which provides that:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, *compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*
>
> (2) Such compensation *is not to be given for any remote and indirect loss or damage* sustained by reason of the breach. (emphasis added)

[30] The first to fourth defendants stressed that the plaintiffs must be able to show a causal connection between the breach and the damages suffered. I do not disagree.

[31] In *Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd* [2023] 3 CLJ 175; [2023] 2 MLJ 566, the Court of Appeal found that the measure of the appellant's damages is the profit suffered by the appellant as a result of the unlawful disconnection of its electricity supply by the respondent:

> [44] In our considered view, the appellant rightly contended that the correct approach to assessment that the LJ should have adopted was to apply the principle that *the measure of damages should be as defined in Livingstone v. Rawyards Coal Co (1880) 5 App Cas 25 at p 38 as 'that sum of money which*

will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation'.

[45] Following the FC decision, the liability of TNB for the wrongful disconnection of electricity supply to the appellant's factory was a non-issue. Likewise, that the appellant had suffered damages that required assessment as a result of that incident. *We are in concurrence with the appellant that the measure of damages should be the profit that the appellant's business could have obtained from a sale of the products or the market value thereof.* The entitlement should be for the appellant to be put into the position that it would have been in had the products in the cold rooms not spoiled as a result of TNB's disconnection of the electricity supply (see *The Clyde* [1856] Swab, 23 at p. 24). (emphasis added)

[32] Similarly, in the present case, the measure of damages that would arise directly from the breach would be the value of the impugned shares that the plaintiffs would have been able to purchase on 18 May 2016 (instead of 28 February 2019). These damages arose directly as a consequence of the first to fourth defendants' breach of the shareholders' agreement. There is therefore a direct causal connection between the breach committed by the first to fourth defendants in not offering the impugned shares to the plaintiffs, with the damages suffered by the plaintiffs. Further, the damages suffered by the plaintiffs would have been within the reasonable contemplation of the parties when they entered into the shareholders' agreement.

Decision

[33] Thus, general damages awarded to the plaintiffs are RM144,322,499, based on the calculation in para. [25] above. The damages shall be paid jointly and severally by the first to fourth defendants.